Old Albany Estates, Ltd. v. Highland Carpet Co.: A Written Confirmation Under U.C.C. Section 2-207

I. FACTS

In *Old Albany Estates, Ltd. v. Highland Carpet Co.*[1] the Oklahoma Supreme Court held that the disclaimer of the warranties of merchantability and fitness contained in a written confirmation of an oral agreement did not constitute a material alteration of a contract between merchants under section 2-207(2) of the Uniform Commercial Code.[2]

The dispute surrounded the sale of carpeting by a manufacturer to a subcontractor for installation in an apartment complex. At the time the oral agreement was made there was no mention of the warranty disclaimer. The buyer first became aware of the seller's disclaimer after reading the seller's invoices, which were "sent with each order,"[3] but arrived prior to the delivery of the carpet. The buyer did not, however, receive the invoices containing the disclaimer until after he had paid for the first shipment. The buyer never objected to the additional terms.

II. BACKGROUND

Section 2-207 of the Uniform Commercial Code provides an alternative to the common law "mirror image" rule for offer and acceptance.[4] In addition, it provides for the treatment of "additional" and "different" terms found in written confirmations of oral agreements.[5] In a case concerning a written confirmation of an oral agreement, no inquiry is made to determine whether the confirmation will act as an acceptance

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1. 24 U.C.C. Rep. Serv. 114, 49 OKLA. B.A.J. 759 (Okla. 1978). At this writing a petition for rehearing is outstanding in the Oklahoma Supreme Court.

2. 24 U.C.C. Rep. Serv. at 117, 49 OKLA. B.A.J. at 761. The Oklahoma statute, which is identical to U.C.C. § 2-207, is OKLA. STAT. ANN. tit. 12A, § 2-207 (West 1963).

3. 24 U.C.C. Rep. Serv. at 115, 49 OKLA. B.A.J. at 760.

4. *See* R. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 37 (1970); Barron & Dunfee, *Two Decades of 2-207: Review, Reflection and Revision*, 24 CLEV. ST. L. REV. 171 (1975). Section 2-207 provides:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
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> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
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> (a) the offer expressly limits acceptance to the terms of the offer;
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> (b) they materially alter it; or
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> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
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> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

5. U.C.C. § 2-207, comment 1.

under subsection (1) of section 2-207; the offer and acceptance phase will have already been completed.[6] Rather the focus of the inquiry is on the identification of the terms of the contract under subsections (2) and (3) of section 2-207.[7] Written confirmations may come from the offeror, the offeree, or both. It has been suggested that whether the additional terms contained in a written confirmation come from the offeror or the offeree, their treatment under section 2-207 should be the same.[8]

Under section 2-207(2), "additional terms [9] are to be construed as proposals for addition to the contract."[10] If the offeror expressly limits acceptance to the terms of the offer, no additional terms, material or immaterial, will become part of the contract.[11] In the absence of an express limitation the analysis shifts to the issue of materiality. If the additional terms "materially alter" the contract they will not become part of the contract *whether or not the recipient of the confirmation objects to them.*[12] If, however, the additional terms are *immaterial* they will be included as part of the contract between merchants unless objection is made within a reasonable time by the recipient of the confirmation.[13]

Subsection (3) is used primarily when the parties have performed without forming a contract under subsection (1) of section 2-207.[14] Subsection (3) may also apply, however, when the parties exchange conflicting written confirmations.[15] In *Old Albany Estates,* which presented only a single confirmation, the court construed the disclaimer as an additional term under subsection (2) of section 2-207. Attention should thus be focused on the proper interpretation of subsection (2).

If the offeror does *not* expressly limit the acceptance to the terms of the offer, under section 2-207(2)(a) the recipient of the confirmation must object to any undesired additional terms only if these terms do *not* "materially alter" the contract.[16] The Code does not define materiality but

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6. *See* American Parts Co. v. American Arbitration Ass'n, 8 Mich. App. 156, 154 N.W.2d 5 (1967); R. DUSENBERG & L. KING, 3 U.C.C. SERVICE § 3.08 at 3-90 (Bender's 1978); Barron & Dunfee, *supra* note 4, at 185-86.

7. DUSENBERG & KING, *supra* note 6, § 3.08.

8. Barron & Dunfee, *supra* note 4, at 185-86.

9. Subsection 1 of 2-207 refers to additional or different terms while subsection 2 refers only to "additional terms." Courts and commentators are split with regard to whether subsection 2 also applies to "different" terms. Since the court held the terms in *Old Albany Estates* to be "additional" terms, an examination of the conflict over the application of 2-207(2) to "different" terms will not be undertaken. *See* Steiner v. Mobil Oil Corp., 20 Cal. 3d 90, 102 n.5, 569 P.2d 751, 759 n.5 (1977).

10. U.C.C. § 2-207(2).

11. U.C.C. § 2-207(2)(a).

12. U.C.C. § 2-207(2)(b); *See, e.g.,* Dorton v. Collins & Aikman Corp., 453 F.2d 1161 (6th Cir. 1972); Steiner v. Mobil Oil Corp., 20 Cal. 3d 90, 101-02, 569 P.2d 751, 759 (1977); American Parts Co. v. American Arbitration Ass'n, 8 Mich. App. 156, 154 N.W.2d 5 (1967); Air Prods. & Chems. Inc. v. Fairbanks Morse, Inc., 58 Wis. 2d 193, 206 N.W.2d 414 (1973); U.C.C. § 2-207, comment 3; DUSENBERG & KING, *supra* note 6, § 3.08, at 3-90; Corman, *The Law of Sales Under the Uniform Commercial Code,* 17 RUTGERS L. REV. 14, 24 (1962).

13. U.C.C. § 2-207(c). *See, e.g.,* DUSENBERG & KING, *supra* note 6, § 3.03 [1], at 3-30.

14. *See, e.g.,* Barron & Dunfee, *supra* note 4, at 194.

15. DUSENBERG & KING, *supra* note 6, § 3.08, at 3-91.

16. *See* text accompanying note 13 *supra.*

the drafters, in the Official Comments, noted that surprise and hardship resulting from the incorporation of additional terms are to be avoided, and suggested several examples of both material and immaterial terms.[17] Official Comment 4 to section 2-207 specifically provides:

> Examples of typical clauses which would normally 'materially alter' the contract and so result in surprise or hardship if incorporated without express awareness by the other party are: a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches . . . .[18]

Some commentators are displeased with what they interpret to be a rigid list of examples contained in the Official Comments. These commentators argue that the specific examples of materiality and immateriality found in the Official Comments may not evince the same degree of surprise and hardship in all business settings. They urge a more flexible approach to materiality:

> Factors such as the amount involved in a transaction, both in dollars and in quantity, the posture of the parties to each other, the nature of the marketplace, custom and usage, intention, and conduct in reliance on a variance are all relevant to determining materiality, and a serious question may be raised as to the propriety of the in vacuo examples of the comments as guideposts[19]

In a number of cases the issue whether a "proposed" additional term "materially alters" a contract has been confused with the requirements of the statute of frauds provision, section 2-201.[20] Many of these cases have arisen in the lower courts in New York[21] and deal with the inclusion of arbitration clauses in written confirmation in the textile industry. Section 2-201 provides that, between merchants, a recipient of a written confirmation must object to the confirmation within ten days or lose any defense based on the statue of frauds.[22] The courts in these cases, reading sections 2-201 and 2-207 together, have ruled that these sections require a merchant recipient to object to a written confirmation within ten days or be bound by the terms of the confirmation. This is clearly a misinterpretation of both sections. Section 2-201 addresses the issue of the availability of a statute of frauds defense. It cannot be used to determine the terms of the

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17. U.C.C. § 2-207, comments 4 & 5.

18. U.C.C. § 2-207, comment 4.

19. DUSENBERG & KING, *supra* note 6, § 3.03 [1], at 3-28 to -29; Barron & Dunfee, *supra* note 4, at 193 (quoting DUSENBERG & KING).

20. Loudon Mfg., Inc. v. American & Efird Mills, Inc., 46 App. Div. 2d 637, 360 N.Y.S.2d 250 (1974); Trafalgar Square, Ltd. v. Reeves Bros., 35 App. Div. 2d 194, 315 N.Y.S.2d 239 (1970); *In re* Phillips-Van Heusen Corp., 15 U.C.C. Rep. Serv. 33 (N.Y. Sup. Ct. 1974).

21. *Id. See also* Campanelli v. Conservas Altamira, S.A., 86 Nev. 838, 477 P.2d 870 (1970) (a case evidencing similar confusion).

22. U.C.C. § 2-201(2) provides:
Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements [of a writing] of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

contract.[23] Additional terms that "materially alter" the contract need not be objected to under 2-207(2).[24]

In general, courts have taken three different approaches to the problem of additional terms in written confirmations. Many courts have properly focused on the materiality of an additional term to determine whether inclusion of that term in a contract was appropriate.[25] Other courts have improperly relied on the statute of frauds provision, section 2-201, and have concluded that failure of the recipient of a confirmation to object binds the recipient to any additional terms.[26] At least one court has required an objection by a recipient without discussing the requirement in the context of materiality or the statute of frauds.[27]

III. ANALYSIS

In *Old Albany Estates*, the Oklahoma Supreme Court regarded the seller's warranty disclaimer as an additional term. The primary issue for the court was whether the warranty disclaimer materially altered the contract between the buyer and the seller since acceptance was not limited to the terms of the offer.[28] After quoting the segment of Official Comment 4 of section 2-207 that lists the disclaimer of warranties of merchantability and fitness as examples of material alterations,[29] the court made the following determination:

> Although the disclaimer in the invoices negated both the warranty of merchantability and fitness, and would normally be construed to "materially alter" the contract, such is not the case, under the facts before us, as [the buyer] was unquestionably aware of the disclaimer--his testimony, as mentioned above, clearly demonstrated that he had read the disclaimers *prior to receiving the first shipment*. The record also clearly demonstrates that no objection to the additional terms was ever made by [the buyer].[30]

The Oklahoma Supreme Court failed to explain adequately why the disclaimer in *Old Albany Estates* was not given its "normal construc-

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23. C. Itol & Co. v. Jordon Int'l Co., 552 F.2d 1228 (7th Cir. 1977); John Thallon & Co. v. M & N Meat Co., 396 F. Supp. 1239 (E.D.N.Y. 1975); Windsor Mills, Inc. v. Collins & Aikman Corp., 25 Cal. App. 3d 987, 101 Cal. Rptr. 347 (1972); McCubbin Seed Farm, Inc. v. Tri-Mor Sales, Inc., 257 N.W.2d 55 (Iowa 1977); DUSENBERG & KING, *supra* note 6, at § 3.08[1], at 3-97 to -99; U.C.C. § 2-201, comment 3: "The only effect, however, is to take away from the party who fails to answer the defense of the Statute of Frauds." *See also* note 12 *supra*.

Recently the New York Court of Appeals helped to clear away some of the confusion in this area. In Marlene Indus. Corp. v. Carnac Textiles, Inc., 45 N.Y.2d 327, 408 N.Y.S.2d 410 (1978), the court held that an arbitration provision found in a written confirmation was a material alteration and that section 2-201 was useless in construing the terms of a contract.

24. *See* note 12 *supra*.

25. *See, e.g.*, cases cited at note 12 *supra*.

26. *See* notes 20-21 *supra*.

27. Ohio Grain Co. v. Swisshelm, 40 Ohio App. 2d 203, 318 N.E.2d 428 (1973).

28. 24 U.C.C. Rep. Serv. at 117, 49 OKLA. B.A.J. at 761. *See generally* U.C.C. § 2-207 (2)(a), *quoted* at note 4 *supra*.

29. *See* text accompanying note 18 *supra*.

30. 24 U.C.C. Rep. Serv. at 117, OKLA. B.A.J. at 761 (emphasis in original).

tion,"[31] that is, why the disclaimer was not regarded as a material alteration of the contract. As an example of additional material terms the drafters of the Code clearly noted the disclaimer of warranties of merchantability and fitness.[32] Indeed, courts and commentators considering the materiality of clauses disclaiming these standard warranties or other limitations on liability have generally concluded that such clauses represent material alterations.[33] Even commentators urging a more "flexible" approach[34] to materiality recognize that in the ordinary case, disclaimers of standard warranties and limitations on liability must be regarded as material alterations.[35] The court might have regarded *Old Albany Estates* as an unusual case if, for example, disclaimers had been established as a standard practice through course of dealing or usage of trade.[36] There is no indication in the court's opinion, however, that course of dealing or usage of trade were issues in this case.

If the primary justification for the court's holding is that the buyer was aware of the disclaimer "prior to receiving the first shipment," the result is unsatisfactory under section 2-207(2). The policy of section 2-207 as expressed in the Official Comments is to protect the parties from unreasonable surprise and hardship caused by the imposition of additional material terms.[37] In *Old Albany Estates* the buyer did not learn of the disclaimer until after he had paid for the first shipment, when performance of the contract was well under way. Holding the buyer to the warranty disclaimer because of knowledge gained after performance had begun

31. 24 U.C.C. Rep. Serv. at 117, 49 OKLA. B.A.J. at 761 (*quoted in* text accompanying note 30 *supra*).

32. *See* note 18 and accompanying text *supra*.

33. Roto-Lith, Ltd. v. F.P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962) (standard warranties); Beech Aircraft Corp. v. Flexible Tubing Corp., 270 F. Supp. 548 (D. Conn. 1967) (pre-Code case in dictum recognized the materiality of a disclaimer of standard warranties under the Code); Earl M. Jorgensen Co. v. Mark Constr., Inc., 56 Haw. 466, 540 P.2d 978 (1975) (limitation of liability was "an essential part of [seller's] offer." *Id.* at 469, 540 P.2d at 981.); Furtado v. Woburn Mach. Co., 19 U.C.C. Rep. Serv. 760 (Mass. Super. Ct. 1976) (standard warranties); Air Prods. & Chem. Inc. v. Fairbanks Morse, Inc., 58 Wis. 2d 193, 206 N.W.2d 414 (1973) (limitation on liability is a material alteration); R. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 37, at 99 (1970); J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 1-2, at 29 (1972); DUSENBERG & KING, *supra* note 6, § 3.03[1], at 3-26. *But see* J.A. Maurer, Inc. v. Singer Co., 7 U.C.C. Rep. Serv. 110 (N.Y. Sup. Ct. 1970) (holding a clause limiting liability for consequential damages was not a material alteration) (result criticized by DUSENBERG & KING, *supra* note 6, § 3.03 [1], at 3-26).

34. *See* text accompanying note 19 *supra*.

35. *See* DUSENBERG & KING, *supra* note 6, § 3.03 [1], at 3-26; Weeks, *"Battle of the Forms" Under the Uniform Commercial Code*, 52 ILL. B.J. 660, 670 (1964).

36. There appear to be two different theories regarding the appropriate treatment of additional terms reflective of course of dealing or usage of trade. Some commentators would treat additional terms that reflect course of dealing or usage of trade as immaterial alterations of a contract. *See* Weeks, *supra* note 35, at 670; Comment, *Nonconforming Acceptances Under Section 2-207 of the Uniform Commercial Code: An End to the Battle of the Forms*, 30 U. CHI. L. REV. 540, 551 n.60 (1963). Other commentators maintain that such terms found in the confirmation serve to explain the original oral contract between the parties and do not therefore add to the contract. DUSENBERG & KING, *supra* note 6, § 3.03 [1], at 3-25.

37. *See, e.g.*, Steiner v. Mobil Oil Corp., 20 Cal. 3d 90, 101-02, 569 P.2d 751, 759 (1977); American Parts Co. v. American Arbitration Ass'n, 8 Mich. App. 156, 172-73, 154 N.W.2d 5, 14 (1967); U.C.C. § 2-207, comments 3 & 4.

subjected the buyer to the type of unreasonable surprise and hardship that the Code expressly seeks to avoid.

The court may not have given sufficient weight to the issue of materiality and instead focused on the failure of the buyer to object to the disclaimer. Such a determination reflects confusion over the mechanics of the statute. Materiality must be determined by the criteria of unreasonable surprise and hardship,[38] that is, whether additional terms significantly add to or subtract from the contract. The failure of the recipient of the confirmation to object becomes an issue only when the additional term is immaterial.[39]

In sum, the Code seeks to protect businessmen from the effects of material terms that are forced upon them. In *Old Albany Estates*, the seller did not mention the disclaimer of warranties at the time the oral agreement was made. There is no indication from the court's opinion that the disclaimer reflected a course of dealing or usage of trade. Although the buyer did learn of the disclaimer before delivery of the carpet, he had already paid for the first shipment. It would therefore appear that the buyer was subjected to the type of unreasonable surprise and hardship that the Code seeks to prevent.

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38. *See* note 37 and text accompanying notes 17-18 *supra*.

39. *See* text accompanying notes 12-13 *supra*.